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In The

Supreme Court of the United States

October Term, 1998

American Academy of Pain Management
a California Non Profit Corporation, ARNOLD FOX, M.D.,
an individual, and B. ELLIOT COLE, M.D., an individual,
Petitioners,

v.

RONALD JOSEPH in his official capacity as the
Executive Director of the Medical Board
of California and not personally.
Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the use of the term "Board certified" or "Board Certification," in advertising, by a physician member of a certification board, inherently misleading when the certification board lacks "objective and consistently applied standards" for certification and/or because the advertising of "board certification" does not meet state standards?

PARTIES

Respondent agrees with petitioners' designation.

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OPINION BELOW

Respondent agrees with petitioners' description.

CONCISE STATEMENT OF THE FACTS

Respondent disagrees with petitioner that the Ninth Circuit Court of Appeals' decision conflicts with other circuits, other decisions of the Ninth Circuit, and the California Supreme Court.

CONSTITUTION AND STATUTES

Respondent agrees with petitioners' designation.

STATEMENT OF THE CASE

California Business and Professions Code section 651 states in pertinent part that it is unlawful for a licensed professional to disseminate public communication which contains a false, fraudulent, misleading, or deceptive statement or claim. In 1990, SB 2036 (McCorquodale) added section 651(h)(5) which addresses the advertising of medical specialty boards. Section 651(h)(5) sets out minimum standards that physicians and surgeons must meet before advertising that they are "board certified" in a particular medical specialty. Subsequently in 1992, AB 2180 (Felando) was enacted into law. This legislation expanded the scope of section 651(h)(5) to include "multi-

disciplinary" boards or associations as it applied to their physician members with respect to advertising specialty board certification status. (See Bus. & Prof. Code, Sec. 651(h)(5)(B) attached to Petitioners' brief, pps. 49a-55a and Judge Lawrence K. Karlton's Order denying Petitioners' Preliminary Injunction attached to Petitioners' brief pps. 16a-17a, hereafter "Or. Excerpt".)

California Business and Professions Code section 651(h)(5) defines three criteria under which physicians may advertise specialty board certification. Those criteria are that the specialty board must either (1) be approved by the American Board of Medical Specialties ("ABMS"); (2) have an Accreditation Council for Graduate Medical Education ("ACGME") approved post-graduate training program in that specialty or sub-specialty area of medicine; or (3) have "equivalent" requirements approved by the Medical Board. (See Bus.& Prof. Code § 651(h)(5)(B). ABMS is the nationally recognized entity that approves medical specialty boards. ACGME is the nationally recognized entity that reviews and accredits postgraduate medical education and training programs. (Bus. & Prof. Code § 651(h)(5)(B) Petitioners' excerpts, pps. 51a-51b.)

The Medical Board of California is a statewide agency authorized to license physicians and surgeons to

practice in California. See California Business and Professions Code section 101(b).

To comply with Bus. & Prof. Code § 651(h)(5), the Medical Board promulgated regulations found at Title 16, California Code of Regulations, section 1363.5 (hereinafter "the Regulations") which were adopted in March 1994. (See Title 16, Calif. Code of Reg., sec. 1363.5 attached to Petitioners' brief, pps. 56a-64a.)

The Regulations were promulgated by the Medical Board to develop and define parameters for "equivalent" standards that a medical specialty board must satisfy in order for their physician and surgeon members to advertise the specific term "board certification" in a particular specialty or sub-specialty area of medicine. The Regulations ultimately adopted in March of 1994 reflect the inclusion of advertising of board certification by physicians who are members of the multi disciplinary specialty boards. (Title 16, Calif. Code of Reg., § 1363.5(b)(3) Petitioners' excerpts pps. 56a-57a.)

The ABMS board certification is a process that attempts to improve the quality of patient care by providing assurance to the public that a certified physician specialist has successfully completed an approved postgraduate training program and an evaluation which includes an examination process designed to assess the knowledge, skills, and experience necessary for the provision of quality patient care in that specialty. It is this

objective that the Medical Board sought to preserve in the Equivalency Track. Furthermore, under the Board's regulations, the words "board certification" means to the California physician and his/her patient that the certified physician has specialized training and knowledge that is either ABMS approved or meets equivalent standards. Additionally, though consumers assume board certified physicians have a great deal of special education and training beyond what is required to be licensed to practice medicine, they lack the expertise to discern the differences in claims of advanced education and/or training by physicians contained in the concept of board certification.

In April 1996, the American Academy of Pain Management (hereinafter "AAPM", "Academy" or "Petitioner") applied for specialty board recognition, as part of the Equivalency Track that was set up in the Medical Boards regulations. In response, the Medical Board hired William K. Hamilton, M.D., as a consultant. Dr. Hamilton reviewed AAPM's application and submitted a written report of his findings to the Medical Board. (Or. Excerpt 18a.)

The Medical Board of California denied the Academy's application on February 7, 1997. It supported its rejection of petitioner's application on the basis of a variety of findings and conclusions. With respect to testing, it noted that the Academy gives a two-hour test consisting of one hundred multiple choice questions,

whereas under the regulation, in order to be equivalent a board must offer a sixteen hour test. Title 16, Cal. Code Regs. § 1363.5(b)(10). The Medical Board of California also concluded that of the 5,000 pain practitioners who were certified at the time of application, only approximately 1,000 have taken the test. (Or. Excerpt pps. 18a and 19a.)

With regard to training, the Medical Board found that the Academy does not currently require any formal postgraduate training. It also concluded that the Academy's proposal for future training programs was deficient because no clinical training was contemplated.[1/]

With regard to the structure of the organization, the Medical Board concluded that the Academy's governing body was not stable and independent since it does not have staggered term limits of not more than six years, and because no provision is made for outside input into the selection of board members. (Or. Excerpt p. 19a.)

The district court denied AAPM's motion for preliminary injunction to stay the enforcement of Bus.& Prof. Code § 651(h)(5)(B) which prohibited use of the term "board certified" by any physician member of any

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1. The District Court agreed with the Board's findings. Petitioner, AAPM, failed to submit evidence that they required post-graduate training or that they required their members to take a test. (Judge Karlton's order denying reconsideration attached to Petitioners' brief hereafter Or. Rec. Excerpt p. 11a)

certifying boards unless the certifying board met ABMS standards or its equivalent as approved pursuant to regulation by the California Medical Board. In summary, the district court found that because petitioner AAPM failed to demonstrate that it has objective and consistently applied standards, and/or because petitioners advertising certification does not meet state standards, then such advertising claim is inherently misleading. Therefore, the statute comports with the First Amendment. (Or. Excerpt p. 24a.)

When petitioners appealed Judge Karlton's order denying their request for a preliminary injunction to the Ninth Circuit, that court found that the district court's finding was not an abuse of discretion. The Ninth Circuit upheld the lower court's finding that AAPM members' use of the term "board certified" was not protected commercial speech under the Central Hudson test because the phrase was inherently misleading. (Ninth Circuit Opinion pps. 3a-4a attached to petitioners brief, hereinafter Ninth Cir Op. Excerpt.)

ARGUMENT

I.

BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT AAPM MEMBERS' USE OF THE TERM "BOARD CERTIFICATION" WAS INHERENTLY MISLEADING

The District Court found when denying petitioners' preliminary injunction that the State may completely ban commercial speech that is either actually or inherently misleading, citing Peel v. Attorney Discipline Comm. 496 U.S. 93, 109 (1991). (Or. Excerpt pp. 21a.) Further, the court held that because petitioner AAPM does not have "objective and consistently applied standards" in the areas of postgraduate training and testing, and/or because advertising certification that does not meet state standards, use of the term "Board Certified" or "Board Certification" is inherently misleading. Therefore, the court found that the application of Bus. & Prof. Code § 651(h)(5)(B) to ban AAPM members' use of the term "board certification" is not a violation of petitioners' First Amendment rights.

The Ninth Circuit Court of Appeals found that the district court's denial of petitioners' application for a preliminary injunction was not an abuse of discretion. (Ninth Cir. Op. Excerpt p. 2a.) The Ninth Circuit cited the Supreme Court four-part test under which the constitutionality of government regulations of commercial speech should be analyzed:

(1) whether the expression is protected by the First Amendment;

(2) whether the commercial speech concerns lawful activity and is misleading;

(3) whether the asserted governmental interest is substantial.

(4) if the answers to (2) and (3) are yes, the Court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. The Ninth Circuit then cited Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) as basis of the four-part test.

The Ninth Circuit emphasized that the district court rightfully found that the expression at issue in this case is "inherently misleading" and therefore unprotected by the First Amendment. (Ninth Cir. Op. Excerpt p. 3a.)

The Ninth Circuit subsequently cited a four-factor test[2/] under Association of National Advertisers v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994) to determine whether an expression is inherently misleading. The Ninth Circuit conceded that the district court did not expressly consider these factors. Despite the district court not considering these factors, the Ninth Circuit nonetheless determined that a preliminary injunction was not warranted and therefore the district court did not abuse its discretion. (Ninth Cir. Op. Excerpt p. 3a.)

Though petitioners make the argument that the Association of National Advertisers v. Lungren case is inconsistent with Peel and Central Hudson decisions (Petitioners' brief pps. 3-4), there does not appear to be any inconsistency among the cases. Rather, in Nat. Advertisers there is a slightly different articulation of a four-part test to determine if an expression is inherently misleading.

Despite the fact that petitioners repeatedly claim in their pleadings that their members' advertisements regarding "board certification" are truthful communications, respondent has disproved this claim, as

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2. That four-part test is (1) whether the speech restricted is devoid of intrinsic meaning (2) the possibilities for deception (3) whether experience has proved that in fact such advertising is subject to abuse; and (4) the ability of the intended audience to evaluate the claims made. [Assoc. of Nat. Advertisers v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994.)]

supported by the findings of the district court and the Ninth Circuit Court of Appeals.

II.

THE PEEL CASE ACKNOWLEDGED THAT THE ABMS AND RESPONDENT HAVE SET THE PROPER STANDARD FOR PHYSICIAN ADVERTISING

Petitioners cite the case of Peel v. Attorney Disciplinary Committee, 496 U.S. 91 (1990) which sets forth a standard for the regulation of commercial speech, and claim that the Ninth Circuit did not consider this standard. This is incorrect. Though the Ninth Circuit opinion does not specifically cite Peel, the case was discussed in oral argument. Additionally, the district court specifically relied on Peel. (Or. Except pp. 13a.)

In Peel, when confronted with a far different evidentiary record, the Court declared unconstitutional a state statute which impacted attorney advertising. The statute in Peel imposed a total ban on an attorney's ability to advertise legitimate specialty status and/or expertise unless the attorney's practice fell within certain practice categories defined by the state bar regulation in question. For example, the state bar allowed attorneys to advertise that they were bankruptcy and/or patent specialists, yet

disallowed advertising as a civil trial specialist. The present case is fundamentally different because the Medical Board's regulation is narrowly drawn to address misrepresentation concerns over the phrase "board certification" in advertising. The regulation specifically contemplates advertising of specialty board status. (Title 16, Cal.Code of Regulations, § 1363.5(b)(3).) The regulation requires that certain nationally recognized standards be met before a physician can use the term "board certified" in a specific field of medicine. Should a physician be certified by a private specialty board that does not meet the national standard, that physician may still advertise that he "specializes" in a given field and he may also advertise that he is a member of the organization. He or she simply cannot use the term "board certified."

In fact, the Peel decision acknowledges that ABMS board certification is based on various requirements of education, residency, examination and evaluation. Further, the Peel court found that though the average member of the public does not know or necessarily understand these ABMS requirements, board certification has "come to be regarded as evidence of skill and proficiency to those to whom they [have] been issued." Peel, supra 496 U.S. at 102-103, fn. 11.

In Peel, the Court recognized that a state may, consistent with the First Amendment, enact regulations

concerning potentially misleading statements by lawyers as to their private certification or specialization. Where such regulations are less restrictive than a total ban, the state may screen certifying organizations so as to distinguish between bona fide boards or associations which issue such certification of specializations and boards or associations which also issue such certification but do so utilizing improper standards. Peel, supra, 496 U.S. at 110.

The same reasoning applies to the Board's promulgation of the regulations, which seek to establish standards for distinguishing between bona fide boards and associations which issue certifications in specific fields of medicine, and those boards and associations which do not meet appropriate standards. Thus, the public may be mislead into believing that a member physician is specially qualified to administer treatment in a medical specialty. Peel, supra 496 U.S. at 109.

The non-ABMS boards that apply to the Medical Board for Equivalency Track recognition under the regulation are in essence "screened" to determine if their claims regarding their board certification of members are in fact misleading. Since petitioners' board certification process did not require any postgraduate training in the specialty field of pain management, and their two hour examination was insufficient, AAPM's claims regarding board certification are inherently misleading and their use

of the term "board certified" in the field of pain management is prohibited. AAPM members can still advertise that they specialize in the field of pain management or that they are a diplomat of the AAPM.

III.

ANY CONFLICT IN THE CIRCUIT COURTS AS TO WHAT TEST IS APPLIED TO POTENTIALLY MISLEADING SPEECH IS IRRELEVANT SINCE THE NINTH CIRCUIT NEVER REACHED THAT ISSUE BECAUSE THE COURT FOUND AAPM MEMBERS' USE OF "BOARD CERTIFICATION" IN ADVERTISING WAS NOT PROTECTED SPEECH

Petitioners claim that because the Ninth Circuit cited a four-prong
test in Assoc. of Nat. Advertisers v. Lungren 44 F.3d 726, 731 (9th Cir. 1994) the decision of that case somehow contradicts Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). (Petitioners' brief, p. 3.)

First, the Ninth Circuit never got to the merits of Assoc. of Nat. Advertisers v. Lungren, supra, because the

district court never expressly considered these factors. (Ninth Cir. Op. Excerpt, p. 3a.) Second, since both the district court and Ninth Circuit found that the speech in question was inherently misleading and not protected speech, neither court needed to move through the remaining prongs of the Central Hudson test. Third, the district court specifically relied on Peel, supra, for its key finding. Judge Karlton specifically found that since AAPM did not have "objective and consistently applied standards"[3] as required by Peel, supra, and that since AAPM members' use of the term "board certified" did not meet state standards, such term was therefore inherently misleading. The Ninth Circuit affirmed the District Court finding. (Ninth Cir. Op. Excerpt, pps. 21a-24a.) And finally, petitioners have failed to articulate in their brief in what manner Assoc. of Nat. Advertisers v. Lungren, supra is in conflict with the Peel case.

Therefore, since the Ninth Circuit never applied the Nat. Advertisers test, the Supreme Court should deny certiorari because petitioners have failed to demonstrate any conflict in the circuit court opinions. Furthermore, even if there is a potential conflict between Nat. Advertisers test and any other circuit decision, such potential conflict is not a sufficient reason for granting

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3. AAPM had no requirement for postgraduate training and/or no "enforced" requirement that all AAPM members take a test to prove their knowledge base.

review. See Stern, Gressman, Shapiro and Geller, Supreme Court Practice (1993) Bureau of National Affairs pp. 172 citing Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952). The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950).

Additionally, though petitioners also claim a conflict between circuit court cases, (See pp. 1 Petitioners' Brief) they do not illustrate which cases they are referring to and in what way they conflict. Instead, petitioners merely attach an unreported district court decision from Florida involving a different statute that regulates the advertising of dentists. (Petitioners cite and attach Borgner v. Cook, Petitioners' Excerpt pps. 33a-48a) In general, the Supreme Court does not grant certiorari to review a decision of a federal court of appeals merely because it is in conflict on a point of federal law with a decision rendered by a district court. District court decisions are not a final decision for purposes of review, in the same way that court of appeals decision are. Stern, Gressman, Shapiro, and Geller Supreme Court Practice, supra at 178.

Furthermore, even if this court were to consider Borgner v. Cook, it is clear that the conflict between that case and the one before this court is merely factual. In reaching its decision, the court in Borgner was relying on a different set of facts than were present in the instant case. The Borgner court relied on the Peel case, among other cases, in reaching its conclusion.

IV.

ADVERTISING BY PROFESSIONAL POSES SPECIAL RISKS OF DECEPTION

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the United States Supreme Court struck down a total ban on advertising by attorneys as a violation of the First Amendment of the United States Constitution. However, the United States Supreme Court, supra, at 383-384, clearly stated that its holding did not preclude restraint on false, deceptive or misleading advertising such as claims about the quality of services, which are not subject to measurement or verification and that there may be reasonable restrictions on time, place and manner of advertising.

The Bates court's reasoning is instructive. The Court recognized that advertising by the professions poses special risks of deception: "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, 433 U.S. supra at 383 [cited in *In re RMJ* (1982) 455 U.S. 191, 200]. Similarly, with physicians advertising medical specialties, the public lacks the sophistication to determine whether "board certification" means that the doctor has met a national

standard or has simply paid a fee to a "bogus board" for a piece of paper.

In Virginia State Board Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748(1976), the court found that distinctions between the professions may require consideration of different factors, specifically pointing out that physicians and lawyers do not dispense standardized products but professional services, and may be treated differently than those who do dispense standardized products. Id. at 775, fn. 25.

The intent of the Medical Board's regulations is to protect the public from misleading advertising by physicians and surgeons relative to their level of training and qualifications. The ACGME and the ABMS set the national minimum standards respectively. The danger when a physician advertises "board certification" without meeting ABMS specialty board standards or their "equivalent" is that the consumer may assume that certification is evidence of skill and proficiency in that specialty that meets national standards, which may not be true. As a consequence, physicians who hold themselves out to the public as being "board certified" when in fact their specialty board does not meet the national standards or their "equivalents" are engaging in false or misleading advertising.

Petitioners cite 44 Liquormart *v.* Rhode Island, 940 F.S. 4137, 116 S.Ct. 1495 (1996) (which involved a

ban on advertising liquor store price), which does not deal with advertising by professionals which pose "special risks of deception" as noted by the Bates court. Bates, 433 U.S. at 383. The 44 Liquormart court found that regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care" and such blanket bans should not be approved unless the speech itself was flawed in some ways, such as the speech being deceptive. (*Id.* at 1499.) As was addressed by the district court and the Ninth Circuit Court of Appeals, the proper review for this type of professional advertising is not found in 44 Liquormart but in Peel, Central Hudson and Bates.

V.

THE STATE CAN DEFINE THE ACCEPTABLE USAGE OF A WORD IN ADVERTISING

Petitioners also seem to assert that this court should grant certiorari because Kale v. South Carolina Department of Health and Environmental Control, 301 S.C. 277, 391 S.E.2d 573 is inconsistent with Peel. (Petitioners' brief pps 15-16.) In Kale, the court looked at the legal definition of the word "hospital" to decide that the term "chiropractic hospital" was deceptive because hospitals are defined as providing medical and surgical

care. Id. at 574. That method of looking at the accepted usage of a term is analogous to the facts in this case. The California Legislature has defined medical specialty board certification to mean a certain level of postgraduate training in the medical specialty, and a valid examination of the subject material learned in the postgraduate training program. This is consistent with the Peel decision which held that "objective and consistently applied standards" can be the basis for the regulation of advertising Board certification. Peel, supra at pp. 109.

The rationale of the Kale and Peel cases is also consistent with the case of the Assoc. of Nat. Advertisers, Inc. v. Lungren, 44 F.3d 726 (9th Cir. 1994). This case involved a California statute prohibiting manufacturer or distributor of consumer goods from representing that its products were "ozone friendly", "biodegradable", "photo-degradable", "recyclable" or "recycled" unless goods met the statute's definition of those terms. Affirming the trial court, the Ninth Circuit found it acceptable for the state to define potential misleading terms. Id. at 731.

CONCLUSION

Petitioners have not met the criteria for this court to grant certiorari. Petitioners have failed to demonstrate an actual conflict between the case. Therefore, petitioners' writ of certiorari should be denied.

Dated: January 29, 1999.

Respectfully submitted,

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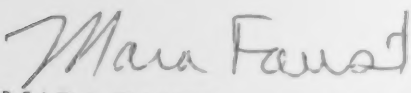

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